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In the Supreme Court of the United States.

October Term, A. D. 1905.

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No. 223.

THOMAS M. PATTERSON, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF COLORADO, ON THE RELATION OF N. C. MILLER, ATTORNEY GENERAL OF THE STATE OF COLORADO, DEFENDANT IN ERROR.

Error to the Supreme Court of the State of Colorado.

BRIEF OF DEFENDANT IN ERROR.

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Of Counsel.

THE SMITH-BROOKS PRESS, DENVER.

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STATEMENT OF THE CASE.

A former brief was filed in this case by the defendant in error in support of its motion to dismiss the case for want of jurisdiction, and it is desired that that brief be considered in connection with the present brief in support of the contentions of the defendant in error. This is more in the nature of a supplemental brief to the one originally filed.

On June 24th, 25th, 26th, 27th, 28th and 30th there were printed in the Rocky Mountain News and

Denver Times certain articles and a cartoon, which formed the basis of the prosecution against plaintiff in error for contempt of the Supreme Court of Colorado.

At the outset it is proper to analyze the articles in question, so that this court may clearly understand the character and scope of the scandalous charges made in respondent's two newspapers, and to refer briefly to the subject matter of the court's decisions, which were the basis of such articles.

In 1903 there was submitted to the vote of the people of Colorado what was known as the twentieth amendment, or Rush amendment, to the Constitution of the state. Said amendment having for its object the establishment of "home rule" for the city and county of Denver. This amendment provided for a charter convention to adopt a charter for the government of the city and county of Denver. The charter provided among other things for the election of the city and county officials of Denver at a different time from that provided by the Constitution for the election of county officers in the other counties throughout the state. At the election in the spring of 1904 there were elected certain officers to perform the duties of said county officials, which officers happened to be Democrats; at the following election in the fall of 1904 the Republican party, believing that portions of said Rush amendment were unconstitutional, nominated candidates for said county offices as they had previously done. The Democratic party also nominated the same persons who were elected in the spring election. As the result of the fall election the Republicans received the highest number of votes. The Democrats who were elected in the

spring had assumed their offices; after the fall election the Republican county officers immediately commenced actions for possession of the offices and to oust the Democratic officials therefrom. It will therefore be seen that the question of who was entitled to these county offices became a political question which precipitated a fight among politicians and which was taken up by the newspapers of Denver.

The respondent was at that time and still is the principal owner and in control of the publication of two metropolitan daily newspapers, to wit, The Rocky Mountain News, which is a morning newspaper, and the Denver Times, an evening newspaper. The respondent was also at that time one of the leaders of the Democratic party and a man of considerable influence because of the ownership of said newspapers and also because he was at that time a United States senator.

Because of the fact that he was particularly interested in the politics of the state, he was naturally very much interested in the decisions of the Supreme Court in these county officers cases.

On the 23d day of June, 1905, the Supreme Court having had the county officers cases under consideration, rendered its decisions, holding certain portions of the Rush amendment to be unconstitutional and that therefore the election of the Democratic officers was not at a time prescribed by law for the election of county officers; that the Republican county officers were duly elected and entitled to their seats.

It was these decisions which called forth the publication of the five articles and cartoon for which the respondent was held to be in contempt of the Supreme Court. It is, of course, impossible for this

court to have the entire knowledge of the events and the true coloring of the situation before it as it existed in Colorado at the time of these publications. In other words, it is impossible for this court to appreciate as fully the meaning of each article, paragraph and word, which was held to be contemptuous of the Supreme Court, as a person who was residing in Colorado and familiar with the political situation as it then existed.

ARGUMENT.

I.

The articles and cartoon were NOT legitimate privileged criticisms. They did relate to pending cases within the meaning of the law. They were calculated to and were intended by the respondent to interfere with and obstruct the due administration of justice and to degrade and bring contempt upon the Supreme Court.

THE FIRST ARTICLE.

The first article was an editorial written by respondent and refers to a decision made the day before by the Supreme Court in the county officers cases. It starts out by saying:

> "The decision rendered yesterday by a majority of the Supreme Court in the election cases is the most far reaching and portentous that has ever been rendered by any court in the United States. For the first time in the country's judicial history it is an-

nounced that the people may amend their state Constitutions only just so far as the Supreme Court is willing that they should."

After commenting further upon the holding of the court it alleges:

"The wrongs that this decision will work are innumerable and irreparable."

And winds up with this most extraordinary paragraph:

"WHAT NEXT? IF SOMEBODY WILL LET US KNOW WHAT NEXT THE UTILITY CORPORATIONS OF DENVER AND THE POLITICAL MACHINE THEY CONTROL WILL DEMAND THE QUESTION WILL BE ANSWERED."

Clearly meaning to infer that the Supreme Court was controlled by the utility corporations and a political machine in its said decision, and was therefore corrupt.

Counsel for respondents say in their brief, page 35, that this paragraph

"relates to the more possibilities of the future, and carries no suggestion of corruption on the part of any court or of the Supreme Court in connection with the cases it had decided."

And then add,

"IT DOES INDICATE that the utility corporations of Denver and the political ma-

chine they control were paramount in Denver's local affairs and that whatever they might wish to bring about would be accomplished."

Nothing whatever is contained in said article about Denver's local affairs. It relates solely to the action of the Supreme Court and infers (and no other reasonable construction can be given it) that the utility corporations of Denver and the political machine are in control of the Supreme Court and that if anybody will let respondent know what more these utility corporations and the political machine demand from the Supreme Court the question will be answered before the Supreme Court passes upon it; meaning that the Supreme Court would surely render such decision as was wanted by the corporations or political machine, whether such decision was according to law or not.

THE SECOND ARTICLE.

The second article is in the nature of a letter written to the Denver Times and is called a "Prophesy." The writer says he has studied the decision of the Supreme Court; that he knows the influences that created the majority of the court; that the sponsors for the chief justice and his colleague Goddard intervened after the last election to carry out a business proposition that means millions upon millions to them, especially William G. Evans; that these sponsors must soon have certain franchises renewed; that certain clauses under the Rush amendment prohibit the granting or renewal of franchises as heretofore; that these sponsors must have the Rush amendment destroyed in order to secure a renewal of their franchises and that their (sponsors') activity to secure

a court that is under obligation to them commences and ends with these franchises.

He then says that the Supreme Court in the county officers cases struck out some of the vital features of the amendment and that "before long—it may be through the decision upon the auditorium bond ordinance—the Supreme Court will wipe out the Rush Amendment."

It is further alleged that

> "the process of killing by elimination is one well known to courts. I have in mind the income tax law that the Supreme Court of the United States declared unconstitutional. That august body first held certain provisions of the law to be unconstitutional, and while what remained was not unconstitutional it held that it was altogether improbable that Congress would have passed the law with the unconstitutional provisions eliminaed; and so it annulled the entire law—the constitutional parts of it as well as the unconstitutional."

He then says that Judge Gabbert (the chief justice) has never forgiven himself for agreeing with Judge Steele in the Sours case, but that since then he has left the Democratic party and

> "Lined up politically with Evans, Cheesman, Hearne, Guggenheim & Company. NOW HE IS OF THEM AND WITH THEM, AND THAT MAKES A DIFFERENCE."

It is then alleged that because of this political alliance the chief justice, Justice Goddard, Justice Campbell, aided by the late judge of the Court of Appeals (Justice Maxwell), will undo the amendment and charter piecemeal, and then with one fell swoop cast the rest into outer darkness.

This is about as bold and outrageous a charge that the Supreme Court or a majority of its members were corruptly in the control of these "sponsors," corporations and political machine as could well be made in the English language. But so as to leave no doubt as to his meaning he concludes this remarkable article with a "Synopsis," as follows:

> "First.—The Tramway and Water companies must have their franchises renewed.
>
> "Second.—The Rush amendment, until utterly destroyed, prohibits the extension unless by a vote of the people.
>
> "Third.—This the Tramway and Water companies can never get.
>
> "Fourth.—The Supreme Court by the process of elimination, and then with a final swipe at what is left, WILL annul the amendment and charter altogether."

Why will the Supreme Court do this? The writer of this article has told us; because of the influence that created a majority of the court and because of their political alliance with Evans, Cheesman, Herne, Guggenheim & Company to carry out the alleged business proposition that means millions upon millions to them.

This article, then, has reference to the action of the court in the county officers cases and tells what the Supreme Court is expected to do through wrong and corrupt motives in the Auditorium case.

Counsel for respondent say that this is not a criticism of the court in the election cases nor does it refer to any cases pending, but that it is avowedly a guess or prediction as to what future decisions are likely to be.

On the contrary, we say that it is a most malicious criticism of the court in the county officers cases, because it charges that the court was under the corrupt influence of the corporations and politicians in rendering its decision, which the article says was the first step towards destroying the Rush amendment, and that the next step was expected in the Auditorium case.

It was known at the time these articles were published that a petition for re-hearing would be filed in the county officers cases, and they were undoubtedly published for the purpose of intimidating the court in their decision therein and in the Auditorium case, and thereby were calculated to interfere with the due administration of justice.

The third article was printed in the Denver Times on June 27, with the knowledge and approval of respondent. It says:

> "Many are the stories being told by the friends of victimized county officers who have been thrown out by the recent famous decision of the Supreme Court."

That William G. Evans has been posing as the keeper of the conscience of the court; that these officials know that Evans was chiefly instrumental in the legerdemain that resulted in the Supreme Court being organized as it now is; that several Democratic officials, desiring Speer's active interference with Evans, and through Evans with the powers (meaning the Supreme Court), held a meeting for consultation. That as a result of the meeting they went to Mayor Speer and told him that if he would interpose for them with Evans that the decision with which they were threatened might be averted, they would stand by Speer, etc., and that Speer gave the necessary promise.

The article then refers to the astonishment of the officials after the decision of the court, and says:

> "It is idle to say that Bill Evans himself would think for a moment of raising his hand to keep the Democratic officials in power when he could, BY PERMITTING THE DECISION, which he expected to be rendered, fill all of the offices with his Republican henchmen."

It will be seen that this article also charges the Supreme Court with being under the domination of Mr. Evans and that such decisions would be rendered by the Supreme Court as he would "permit."

It was the intention of the publisher to have this defamatory article appear in the guise of stories being related by friends of the Democratic officials, but the paragraph which is most objectionable, the one

wherein it is charged that it was idle to say that Mr. Evans would permit a decision to be rendered which would fill the offices with Democratic officials instead of Republican henchmen, does not appear under any such guise.

THE FOURTH ARTICLE.

The fourth article was published in the Denevr Times on June 28 and is an editorial written by respondent under the heading of "The Press and the Courts," and is very significant because of its malicious attack upon the judiciary and courts in general, as well as upon the Supreme Court of Colorado. The article starts out with this sentence:

> "Thinking men long ago concluded that if this country shall ever lose its liberties, it will be through the judiciary."

Following this is a long statement regarding the encroachment of the courts upon the fundamental principles of government and the organization of the court by men who may be weak, vain or corrupt and tools upon the bench (meaning the justices of the Supreme Court of Colorado), and concluding with a reference to two so-called corporation papers of Denver, the Post and Republican, demanding that the respondent should be prosecuted for his attitude toward the Supreme Court, and alleging:

> "The occurrences of the past year in which judges have been the principal actors—using their tremendous power against men and parties and measures—have seemed to the Times to merit the fullest criticism and that no reasonable censure could be too

> severe. * * * If by the doings of last winter the relation and connection of certain judges with the legislature and with the heads of great corporations and with the appointing power of the state could be uncovered the public would be astounded."

Thereby implying that certain judges of the Supreme Court were subservient to certain great corporations.

The article concludes with this paragraph:

> "But the Times mildly but firmly informs these corporation mouthpieces that the Times can as well be edited with its editor behind the bars as from the editorial rooms of the paper, and perhaps the more effectively arouse the public to its danger."

The publisher, after hurling these slanderous articles at the Supreme Court day after day, and knowing that the articles were contemptuous in the extreme, continued to invite action on the part of the Supreme Court.

THE FIFTH ARTICLE.

The fifth article was published in the Times on June 30th, and contains an interview with respondent, and was submitted to him and published with his approval, and is headed:

> "Senator Patterson to be charged with contempt. He expects the citation of the Supreme Court of the state to be served upon

him to-day, and he will promptly respond to the summons."

The articles refer to a meeting of the grievance committee of the State Bar Association, held at the request of Chief Justice Gabbert and Justice Goddard, of the Supreme Court, and with recommendation of that committee that procedings be instituted against Senator Patterson for articles and cartoons appearing in the News and the Times, relating to the court's recent charter and other decisions; of the fact that Lucius W. Hoyt, secretary of the Bar Assaciation, recommended both disbarment and contempt proceedings, and to the fact that Judge Goddard is president of the State Bar Association, and also referred to the interview with Senator Patterson, in which he expressed his desire to appear before the Supreme Court, and adding:

> "I am responsible for every one of them (articles), and either wrote or approved of them. * * * I know that under the circumstances the tribunal to try me will be pretty much like a court martial, only there will be no reviewing court or officer or other tribunal to interfere with whatever the court may decide. I consider the proceedings against me as a direct assault upon the freedom of the press, and I shall defend that ancient and important prerogative of a free people with all my power. I should say no more now; let the future tell the story."

The respondent assumed this defiant air for the purpose of further aggravating the Supreme Court,

and with the view of degrading and bringing the Supreme Court into contempt and disrepute with the people who were the readers of respondent's newspapers, intending thereby to intimidate the court and obstruct the due and orderly administration of justice.

THE CARTOON.

The cartoon to which we especially call the court's attention, and which was published in the Sunday edition of the News of June 25, represents four of the justices of the Supreme Court, to wit, Mr. Justice Goddard, Justice Campbell, Justice Bailey and Justice Maxwell, sitting upon the Supreme Court bench looking over at Chief Justice Gabbert, who is standing below and in front of the bench, represented as the "Lord High Executioner." The chief justice is holding a bloody axe, having just cut off the head of Sheriff Armstrong, one of the county officers, whose head reposes in a basket near by. The picture also represents the other county officials on their way to the execution, and to the left of the executioner are urns containing "ashes of other slaughtered Democrats." This indecent cartoon is intended to create the impression that the Supreme Court of Colorado has created judicial murder.

It is headed "The Great Judicial Slaughter House and Mausoleum," and above this heading in big red letters occurs the following:

> "If the Republican party has overlooked anything from the Supreme Court it will now proceed to ask for it."

The respondent claims that the heading in red letters he is not responsible for. That it refers not to

this "judicial slaughter house," but to an article appearing below and to the right of the cartoon. It appears to us to have reference more particularly to the cartoon, but, be that as it may, the cartoon with the accompanying words of explanation do not need any additional words of explanation to render it sufficiently contemptuous to justify the action of the Supreme Court in punishing respondent for contempt. But as we have said, it was not the cartoon alone, nor any one article, but the continuous publication of these bitter and unwarranted attacks upon the Supreme Court from day to day which finally made it imperative on the part of the court for its self-protection, as well as the duty it owes to the people, to sustain its dignity and honor by citing the respondent before it and punishing him for contempt.

In People vs. Wilson, 64 Ill., 219, the court say:

> "That the question whether or not the publication had a tendency, or was calculated, to impede, embarrass or obstruct justice is clearly one of law for the court, to be determined upon inspection of the article and a consideration of the circumstances under which it was published."

> "The true liberty of the press is amply secured by permitting every man to publish his opinion; but it is due to the peace and dignity of society to inquire into the motives of such publication, and to distinguish between those that are meant for use and reformation, and with an eye solely to the public

good, and those which are intended merely to delude and defame."

Res Publica vs. Oswald, 1 Dal., 349;
and s. c., 1 Am. Dec., 246.
State vs. Morrill, 16 Ark., 403.

SUITS PENDING.

The articles and cartoon in question were published concerning the action of the Supreme Court in the county officers cases and the auditorium bond case. The important question in all of these cases was the constitutionality of all or portions of the so-called Rush Amendment. This question was as much involved in the auditorium bond case as in the county officers cases.

In the county officers cases the decisions had been rendered by the Supreme Court on the 23rd day of June, 1905, but there still remained the right to file petitions for rehearing if desired, and as a matter of fact petitions for rehearing were filed in said cases on June 30, 1905, so that these cases were not finally disposed of by the Supreme Court, but its decisions were still under its control, subject to modification, alteration or even reversal, and were in contemplation of law still pending cases at the time of the publication of said articles and cartoon.

In the case of *In re Chadwick*, 109 Mich., 588, one of the Circuit Courts of that state had entered a decree in a particular case on the 2d day of November, 1894, and on the 8th day of the same month Mr.

Chadwick, an attorney of record in the case, wrote and had published a contemptuous article concerning the trial judge. Upon his being punished he raised the objection that his letter did not refer to a case pending in court at the time of its publication. But the Supreme Court of Michigan, in passing upon this point, at page 602, uses this language:

> "The contention of the respondent that his letter did not refer to a case pending in court, cannot be maintained. The decree had not been enrolled; it was still subject to modification upon motion. The court could order a rehearing. No appeal had then been taken to this court. The costs had not been taxed and no execution issued. Neither was it in condition to issue execution. The case cannot, therefore, be held to have reached that stage where it can be said that it was not pending in that court. Fishback vs. State, 131 Ind., 304."

In *State vs. Faulds*, 17 Mont., 140, the respondent, Faulds, who was the editor, publisher and proprietor of the Northwest Tribune, a weekly newspaper of general circulation in Montana, published a contemptuous and defamatory article of and concerning the judges of the Supreme Court of that state, with respect to certain cases in which opinions had been handed down. Among other points raised by the respondent, was one to the effect that the cases concerning which he had published the article were not pending at that time. But the court, in passing upon this point, at page 143, says:

> "The respondent, as a second ground for quashing the writ in the case, contends that it does not appear that, at the time of the publication in question, any of the cases referred to therein were pending before this court. In this the respondent is in error, we think. The affidavit states that no remittitur had been issued by this court in any of the cases mentioned therein. This court obtained jurisdiction of the cases by appeal. It did not part with that jurisdiction so long as no remittitur had been issued returning the case to the District Court. In Kimpton vs. Jubilee Placer Mining Company, 16 Mont., 379, on petition for rehearing, this court held that it had jurisdiction until the remittitur had been issued. (See authorities cited in that opinion. See, also, Haynes New Trials & App., section 293, and authorities cited.)

In State vs. Tugwell, 19 Wash., 238, the defendant published a contemptuous article in the Tacoma Sun concerning the Supreme Court of that state, in connection with certain cases decided by it, but in which remittiturs had not yet been issued. The respondent urged that such cases were not pending. But the court, in passing upon this point, at page 256, says:

> "An action has been deemed pending in this court until the remittitur issued, but counsel have argued that, although the statute does not determine when jurisdiction

ends in this court, yet the court, having been authorized by statute to frame rules, has by its rules determined the question of the conclusion of the case, and refers to Rule XIII:

"'1. Every petition for rehearing must be filed within thirty days after the opinion shall have been rendered, and no more than one petition for rehearing of the same question shall be filed; provided, that the court may, in its discretion, allow any petition to be amended. The filing of a petition for rehearing shall suspend the decision of the court until a ruling thereon.'

"Elliott on Appellate Procedure, says, section 558, 'A second petition from the same party will not be considered,' and that has been the practice in this court. The first opinion in the case was followed by a petition for rehearing on the part of the appellant. Leave to print and file additional briefs was granted by the court, and the case assigned regularly and reargued orally in the court, and the opinion of the majority of the court then filed reversing the judgment of the superior court. A petition was then filed by counsel for respondent, praying for an important modification of the opinion filed; and subsequently, an opinion filed denying such modification. There can be no doubt of the jurisdiction of this court over the case and the power to make any modification of its opinion until the final judgment was rendered and until the remit-

titur issued. Under the law, the courts in this state are always in session, in legal contemplation.

"'An action is "pending" * * * until the judgment is fully certified.' (Anderson's Law Dict., verb., pend.)"

In Fishback vs. The State, 131 Ind., 304, the respondent published certain articles tending to impede and embarrass the work of the grand jury, and as a reason why he should not be punished he urged that the articles were not concerning pending cases. But the court, at page 313, says:

"'The general rule is, that to constitute any publication a contempt, it must have reference to a matter then pending in court, and be of a character tending to the injury of pending proceedings upon it, and of the subsequent proceedings.' Rapalje, Contempts, section 56; 2 Bishop, Crim. Law, section 262.

"But as to the pendency of the action, it may be said that its pendency does not terminate with the return of the verdict of the jury, or the rendition of the verdict, but may be said to be pending while it remains *in fieri*, for after judgment the parties are still in the court for certain purposes. A motion for a new trial may be made and the new trial granted without additional notice."

"As applicable to this question, though the grand jury may have stopped the examination, it was no bar to further investiga-

tion. It may have been renewed at any time. So that the publication of an article reflecting upon the grand jury, tending to bring them into disrepute and embarrass and interrupt a legitimate investigation by them as to the commission of a crime, at any time during their session, would be subject to the cognizance of the court, and the author subjected to punishment if guilty of contempt. The grand jury may be said to be open at all times during its session for the investigation of crimes of which they have jurisdiction, and the fact that they have made partial investigation and suspended, not intending at the time to pursue it further, does not prevent them from again taking it up and pursuing it."

In Bloom vs. The People, 23 Colo., 416, respondent published certain articles concerning the court's action in the appointment of a receiver, and, for one of the grounds for defense, urged that such case was not pending, the receiver having been appointed. But the appellate court, in passing upon this point, at page 422, says:

"While the act of appointing the receiver was a past act, yet the case in which it was done was pending; it was not fully determined. Even the matter of the appointment was still before the court, and orders of the court in reference thereto were subject to review, and the receiver's acts and the approval or disapproval of his reports were

still to be passed upon by the court. Hence the cause was still pending and the case is brought within the doctrine to which some of the authorities have restricted it. (In re Chadwick (Mich.), 67 N. W. Rep., 1071.)

See, also, the following cases:

In re Pryor, 18 Kansas, 72.

Ex p. Turner, 3 Mont., D. & De. G., 523.

King vs. Freeman's Journal, 2 Ir. Rep., 82.

Opinions in the causes mentioned in the information as "county officers' election cases," had been handed down by the court, but, under the rule of court allowing the same, petitions for rehearing were filed in the causes and were undisposed of on the day of the last of said publications, to wit, June 30th; and upon the petitions for rehearing the original judgment in all of said causes, save one, were materially modified.

THE AUDITORIUM BOND CASE.

The auditorium bond case at the time of the publications had been argued and submitted to the court, and was then under consideration for final decision. As we have heretofore shown, the same question, that of the constitutionality of the Rush Amendment, was involved in this case as well as the county officers cases.

IN NOT REQUIRING THE INFORMATION FILED BY THE ATTORNEY GENERAL TO BE VERIFIED, BEFORE ISSUING THE RULE TO SHOW CAUSE, THERE WAS NO ERROR.

The territory which is now designated as the state of Colorado was, before it became a part of the possessions of the United States, owned by France and Spain, and was acquired through the Louisiana purchase and the treaty of Guadaloupe Hidalgo. Previous to the acquisition of this land, the civil law prevailed therein. When Colorado was organized into a territory, the legislature adopted the common law of England so far as it was applicable and of a general nature, and the state legislature later confirmed its allegiance to the common law statute as passed by the territorial legislature.

Under the English common law, the office of attorney general was as ancient as the law itself, dating back to some time in the year 1500. He was the attorney for the Crown, and it was his duty to file informations in the most serious crimes and misdemeanors; in trespasses affecting the land of the king; in certain corporation matters; in matters of charity which affected the people at large; and in those things which tended to bring into contempt the sovereign power. Such informations were filed by him ex-officio, his official oath being considered the equivalent of a verification.

Mr. Blackstone, in discussing the question of informations directed in the name of the king, sets

forth the rule in regard to the manner of preparing the same, as follows:

> "The informations that are exhibited in the name of the king alone are also of two kinds: First, those which are truly and properly his own suits and filed ex-officio by his own immediate officer, the attorney general. * * * The objects of the king's own prosecution filed ex-officio by his attorney general, are properly such enormous misdemeanors as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions."
>
> Cooley's Blackstone (3rd Ed.), volume 2, page 468.

> "There can be no doubt but that this mode of prosecution by information, * * * filed on record by the king's attorney general, or by his coroner or master of the crown office in the court of the king's bench, is as ancient as the common law itself. For, as the king was bound to prosecute or at least lend the sanction of his name to a prosecutor, whenever the grand jury informed him upon their oaths that there was a sufficient ground for instituting a criminal suit; so, when these, his immediate officers, were otherwise sufficiently assured that a man had committed a gross misdemeanor either personally against the king or his government, or against the public peace and good

order, they were at liberty, without waiting for any further intelligence, to convey that information to the court of king's bench by a suggestion on record, and to carry on the prosecution in his majesty's name."

Idem, page 469.

State vs. Dover, 9 N. H., 468, 471:

"The rule on this subject, as laid down in the English authorities, is that the attorney general is the sole judge of what public misdemeanors he will prosecute, and that he may file an information against any one whom he thinks proper to select, *without oath or motion,* or without opportunity for the defendant to show cause against the proceeding, and that the conduct, continuance, the suspension and the dropping of the prosecution are left entirely to his discretion, subject, of course, to the liabilities imposed by law for wilful abuse of process. 11 Har. State Trials, 270; 4 Black. Com., 312; Bacon Ab. Information, A; 1 Chit. Crim. Law, 845."

In *Mr. Chitty's Criminal Law, volume 1, page 845,* there is set forth a form of the proper sort of information to be filed by the attorney general under the common law of England, as follows:

"The commencement of an information, ex officio, is as follows: 'Be it remembered that W. G., attorney general of our sovereign lord, the now king, who for our said lord,

the king, prosecutes in this behalf in his proper person, comes here into the court of our said lord, the king, before the king himself, at Westminster, in the county of Middlesex, on, etc., and for our said lord, the king, giveth the court here to understand and be informed that,' etc. * * *

"'Whereupon the said attorney general of our said lord, the king, who for our said lord, the king, in this behalf prosecutes and prays the consideration of the court here in the premises, and that due process of law may be awarded against the said C. D. (the defendant), in his behalf, to make him answer to our said lord, the king, touching and concerning the premises aforesaid, etc.' And the whole is then subscribed by the signature of the attorney general, and filed in the crown office."

In the case of *Rex vs. Wilkes, 4 Burrows Reports, page 2527*, an information was filed out of term time by the solicitor general against Mr. Wilkes, charging him with having published and caused to be printed a seditious and scandalous libel. It appears that Lord Mansfield, in chambers, permitted the information to be amended, over the refusal of counsel for Wilkes, to consent to the amendment.

"Lord Mansfield having, in the presence of these gentlemen, consulted and produced many precedents, and being fully satisfied 'that the amendment might be made by a

single judge, at his house or chambers,' told Mr. Phillips (counsel for defendant), 'that *there was no need of his consent.*'"

Idem, page 2528.

"And why should it not be amended? If it had not been amended, the attorney general would have dropped this information, if he thought there was a slip in it, and have brought another. And this would have been more inconvenient to the defendant, and have harassed him more; he would have no benefit and more vexation."

Idem, page 2568.

"The substance of the charge was not at all altered; it remained the very same. The true merits of the cause stood the very same. * * *

"There is a great difference between amending indictments and amending informations. Indictments are found upon the oaths of a jury, and ought only to be amended by themselves; but informations are as declarations in the king's suit."

1 Bishop's New Criminal Procedure, page 83, section 142:

"The right to make the information is, by the English law as it stood when this country was settled, in the attorney general, who acts upon his official discretion without the interference of the court; or, dur-

ing a vacancy of this office, in the solicitor general. The court will not even give the officer leave to file the information, for he does it of right."

Under the Colorado Constitution, the attorney general's office is mentioned in relation to the various state boards. It is referred to by title and the qualifications for such office set forth. There is no definition of the duties, such as are set out in regard to the office of the district attorney. Therefore, we must look to the common law for any rule in regard to his duties and rights. A great many of the powers of the attorney general have been taken away by our statutes and placed in the hands of the district attorney, an officer created by the Constitution of the state of Colorado. The district attorney prosecutes all criminal cases in the *nisi prius* court, and files the informations in cases of crimes in the lower courts. Of this power the Constitution has divested the attorney general's office. The statutes of Colorado, to a very limited degree, define some of the duties of the attorney general's office. He is required to prosecute suits in the Supreme Court, and in such inferior courts as the governor or legislature may direct, to prepare contracts and to give opinions in writing when requested so to do by the legislative or executive departments of state. Aside from this, his duties have been left as they existed at common law.

The powers ascribed to the attorney general under the common law in our own state courts have been very extensively defined in the case of *Hunt vs. The*

Chicago & Dummy Railway Co., 20 Appellate Ct. Reports, 282.

We call attention to the fact that the Illinois statutes covering the office of the attorney general are practically the same as those of Colorado, and analogous to the powers and duties of that officer under the common law in England.

In this case an information in chancery was filed by George Hunt, attorney general of the state of Illinois, on the relation of John McConnel and others to restrain a street railway company from constructing and operating a railway upon certain streets of the city of Chicago. The information prayed for a decree perpetually enjoining and restraining the company from constructing or operating any railway under and by virtue of either of said ordinances, etc. The defendant demurred on the ground that *the attorney general is not authorized by law to prosecute this information.*

In Illinois, after the adoption of the Constitution, a number of acts were passed in regard to attorneys general, setting forth the duties of the office, but no statute was enacted giving the attorney general power to prosecute under such information. The question then was asked: *Is the attorney general vested with any common law powers not specifically conferred by statute?*

> "There is nothing in our present Constitution or statutes which necessitates, in our opinion, a construction which would exclude the attorney general from the exercise of common law powers in addition to those

conferred by the statutes. The Constitution authorizes him to perform such duties as may be *prescribed* by law. It is said that the word 'prescribed' can properly be held to refer only to the statutory law—the *lex scripta*. This, plainly, is too narrow an intrepretation of the word."

* * * * * *

Idem, page 288.

"This view is further supported by the provisions of the statute in relation to the duties of the attorney general. That, as has already been stated, provides that, in addition to certain duties therein specified, he shall attend to and perform any other duties which may from time to time be required of him by law. The common law of England having been expressly adopted in this state, is as much a part of our law, whenever it is applicable, and so far as it has not been changed by statute, as are the statutes themselves; and a duty required of the attorney general by the rule of the common law is as much a duty 'required of him by law' as though it were imposed by the express mandate of a statute."

Idem, page 289.

* * * * * *

"It must be admitted that there is no statute imposing upon the attorney general the duty of instituting or becoming a party

to any legal proceedings for the protection or preservation of funds held in trust for public charity. Whence, then, arises such duty? Manifestly from the principles of the common law, which make the attorney general the proper representative of the people of the state in all courts of justice, and charged him with the official duty of interposing for the protection and preservation of the rights of the public whenever those rights are invaded, and there is no other adequate or available means of redress."

Idem, page 290.

In the case of *The People vs. Charles L. Wilson, et al.*, page 195, we have the form of an information signed by the attorney general, but not verified by him; nor are there any affidavits filed in support of the information so far as the record shows. We here set forth in brief the information:

"And now come the said people, by Washington Bushnell, attorney general, and represent to the court that on the 16th day of October, A. D. 1872, there was, and still is, pending in this court, a certain cause for the adjudication and determination of this court, wherein one Christopher Rafferty is plaintiff in error and The People of the State of Illinois are defendants in error, and that, on the same day, there was published in the city of Chicago, in said state, a certain daily newspaper called the Chicago

Evening Journal, of which said paper on said day the said Charles L. Wilson was proprietor, and the said Andrew Shuman was editor, and that said Charles L. Wilson and Andrew Shuman, on the said day, caused to be published in said paper of and concerning said cause so pending in this court, and of and concerning this court and its supposed action with reference to said cause, a certain article, in the words following, that is to say:

"'THE CASE OF RAFFERTY.'

* * * * * *

"Wherefore, the said attorney general, for and on behalf of the said people, moves this court for a rule upon the defendants, Charles L. Wilson and Andrew Shuman, to be and appear before this court, on a day to be named, and show cause, if any they or either of them have, why an attachment should not issue against them for contempt of this court in respect to the publication of said article.

"WASHINGTON BUSHNELL,
"Attorney General."

In *Cartwright's Case,* 114 Mass., 230, an information was filed by the attorney general, but not verified at any time. Some days later an affidavit in support of the information was filed. The information was as follows:

"And now, the attorney general informs the court that John W. Cartwright, one of

the receivers heretofore appointed in said cause, has been guilty of gross negligence and malfeasance in the duties of his said office; wherefore, the attorney general moves that said Cartwright be removed from his said office, and for such other decree in relation thereto as the nature of the case may require.

"CHARLES R. TRAIN,
"Attorney General."

"The provision for proceedings 'as for contempt' prescribed in the Code, section 654, applies only to civil actions, except subsections 4, 5 and 6. Cromartie vs. Commissioners, 85 N. C., 211. 'Proceedings as for contempt' should always be based upon affidavits. We do not think that this is required in proceedings for contempt proper, which, whether the contempt is committed in the presence of the court or not, are begun by the court, *ex mero motu*, to preserve its dignity, to maintain order, or to enforce the respect due, and obedience to its process. *Ex parte Moore*, 63 N. C., 397."

In re Deaton, 105 N. C., 59, 64.

"The other objection, that the rule was made without affidavit or other legal proof of the facts upon which it is based, is equally untenable. It is admitted that where the proof is furnished by the senses of the judges, it may be acted upon. Here there was such proof. We knew by our senses

that a newspaper containing the paper referred to, purporting to be signed by Mr. Moore and others, had been extensively circulated and was then in the court room; and the want of a disavowal on his part, that he had signed the paper, or consented to its publication, furnished prima facie proof, not sufficient for final action, but all sufficient as ground for the rule. On his appearance he was at liberty to deny the fact without an oath, and the denial, like the plea of 'not guilty,' would have simply put the fact in issue—and he would have been entitled to have the rule discharged, unless the fact was proved by direct testimony."

Ex parte Moore and others, 63 N. C., 397-340.

In *Meyers vs. State*, 46 Ohio, 473, an information was filed by counsel specially appointed by the court for that purpose charging the publisher of a newspaper with contempt. We copy from the opinion of the court as follows:

"The publication came within section 5639 of the Revised Statutes, which reads: 'A court or judges at chambers may punish summarily a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice.' It is true that the article was not written, nor was it circulated, by the respondent in the presence of the court. Indeed, it was written in the city of Cincinnati, though

dated at Columbus. But the publication was in the court room, as well as elsewhere. It was intended to have effect and did have effect in the court house at Columbus, *and the writer was just as much responsible for that effect as though he had in the court room itself, and while the trial was progressing, circulated and read aloud the article or uttered the libelous words verbally.*"

And again, at page 492:

"It was competent for the court to take judicial notice of pertinent facts connected with the transaction which came within the cognizance of his own senses."

In the matter of Sturoc, 48 N. H., 428; 97 Am. Dec., 626, the editor of a newspaper wrote and published an article concerning a case then pending in the Justice Court, for the purpose of inciting public opinion against the merits of the prosecution, and the court thereupon made a rule citing the defendant to show cause why process of contempt should not issue against him, and the Supreme Court sustained the action of the lower court.

In re Pryor, 18 Kan., 72-73, an attorney of record in a cause then pending in the court in which counsel's motion to dissolve an injunction was overruled, wrote a personal letter to the judge of the court, and among other things asserted:

"I can hardly believe that such is the fact, *for it is directly contrary to every prin-*

ciple of law governing injunctions, and everybody knows it, I believe."

Upon receipt of this letter, the judge issued a warrant for the arrest of the writer, and, after a hearing, adjudged him guilty of contempt and fined him fifty dollars therefor and suspended him from practice in the courts of that district until the fine should be paid. The Supreme Court, upon review, held that the language used was insulting and disrespectful, and was, in fact, in the presence of the court, either *"real or constructive."*

A great many cases will be found where it is contended that an information must always be supported by an affidavit, but an inspection of these cases will show that the information in question was to be filed by the district attorney.

Nearly all of the states of the Union have special statutes, creating the office of district attorney and setting forth the manner of procedure in his department. Where such is the case the attorney general is relieved of all duties in this respect except those specifically set forth by statute in regard to filing informations in the lower courts. But this does not deprive him of his common law right to file informations in the Supreme Court; nor is he bound by analogy or otherwise to follow the methods prescribed for the office of the district attorney.

IT WAS NOT NECESSARY THAT A FORMAL COMPLAINT SHOULD FIRST HAVE BEEN MADE TO THE COURT.

In matters so closely related to the court itself and of such public knowledge as were the incidents constituting the alleged contempt in this case, we submit that it was not necessary that a formal complaint should have been lodged in order to set in motion the machinery of this court. Any one of the judges, or any member of the bar, or any citizen, through the attorney general, could have initiated this proceeding. Since the Supreme Court of this state is one of the departments of the state government, the people are concerned in its protection and preservation. Any citizen might have made application to the attorney general, who, being a common law, as well as a statutory officer, could have filed the information unverified, as was done in the old common law time.

The articles and cartoon appearing in metropolitan papers of wide circulation could not possibly have escaped the notice of members of the Supreme Court, and would not only affect them, but all of the reading public. Such publications are so brought to the public attention that the court could, of its own motion, take judicial notice of the fact that they had reached the public mind.

The plaintiff in error admitted that he was responsible for the articles and cartoon in question, in an interview in the Rocky Mountain News on the morning of the day on which the information was filed. This fact having reached the public through the newspapers and necessarily having come within the knowl-

edge of the court, the judges of that court were in possession of all the facts within the knowledge of the attorney general, as they appeared in the newspapers of plaintiff in error, and upon which this case is based.

Such publications must necessarily have an effect on and embarrass the proper administration of justice and in doing so they become analogous to direct contempts, and can be proceeded against accordingly.

The question of whether a newspaper publication is a real or constructive contempt has been passed upon many times and invariably the courts have held that it is not necessary to file an affidavit in support of the issuing of a citation.

Meyers vs. State, 46 Ohio St., 473, 490.

Telegram Newspaper Co. vs. Com., 172 Mass., 294, 298.

People ex rel. Horace Greeley vs. Court O. & T., 27 How. Prac., 14, 18.

Matter of B. F. Moore and others, 63 N. C., 397, 404.

People vs. Court of Sessions, 31 N. Y. S., 373, 375, 377.

In re State vs. Post, Ohio N. P., 157, 159.

State vs. Frew, 24 W. Va., 416, 471.

State vs. Morrill, 16 Ark., 384, 385.

In the matter of Sturoc, 48 N. H., 428, 431.

THE SUPREME COURT OF COLORADO HAD THE POWER AND THE JURISDICTION TO RENDER THE JUDGMENT WHICH IT DID RENDER IN THIS CASE. NO CONSTITUTIONAL RIGHT OF PLAINTIFF IN ERROR HAS BEEN INVADED. THE PROCEEDINGS HAD IN THE STATE COURT WERE "DUE PROCESS OF LAW." NO FEDERAL QUESTION IS INVOLVED AND THIS COURT IS WITHOUT JURISDICTION.

Upon the record in this case and under the authorities, we submit that the following propositions are clearly established:

First. The Supreme Court of Colorado, being a court created and existing by virtue of the Constitution of the state of Colorado, deriving its powers from that instrument and not from any act of the legislature, is vested with inherent power to punish contempts, and this power can not be destroyed nor abridged by any act of the legislature.

Second. That the inherent power of courts of superior jurisdiction to punish for contempts of their orders and authority, is a necessary and proper one, and the infrequency of the exercise of that power does not argue against either the existence of the power or the necessity therefor.

Third. That proceedings in contempt constitute "due process of law" within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Fourth. That the right, privilege or immunity claimed by plaintiff in error is in reality not one

guaranteed him by the federal Constitution, but his claim is none other than that a right or privilege guaranteed by the Constitution of the state of Colorado, namely, the right to freedom of speech, has been violated.

Fifth. That the denial by the Supreme Court of Colorado of the right or privilege so claimed under the state Constitution, is binding and conclusive upon the Supreme Court of the United States, and raises no federal question, nor does it entitle the plaintiff in error to review in this court.

We shall discuss these matters together.

The Supreme Court of Colorado is created by virtue of constitutional provision and vested with judicial power as to matters of law and equity; with appellate jurisdiction co-extensive with the state; with a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law, and with power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction and other remedial writs, with authority to hear and determine the same.

The Constitution of Colorado contains nothing by way of limitation upon or abridgment of the powers, functions and attributes of this tribunal as a court. When this court came into being, under and by virtue of the fundamental law of the state, it became and was clothed with the powers, functions and attributes of a court of superior jurisdiction, deriving those powers, functions and attributes from the people themselves.

Among the essential powers of the court were the powers of self-preservation and of self-protection. As an incident to these powers and as necessary to the

exercise thereof, and as essential to the existence of the court itself, was the power to enforce obedience to its writs and orders; to preserve order and compel respect for the authority of the court, and to prevent interference with or obstruction of the due administration of justice, and to punish attempts to degrade or influence the court in the discharge of its duty in pending cases. All of this, of necessity, implies the power to punish for contempt.

It cannot be that the people of the state, in adopting their Constitution, intended to deprive this court of the power which had been exercised by similar courts from time immemorial. It cannot be that there was any intent to abridge this power, nor to subject it, to any degree, to the control of the legislature of the state.

To subject this inherent and necessary power of the Supreme Court of the state of Colorado to legislative control or limitation would be to subordinate the judicial branch of the government to the legislative and to violate the theory of distribution of powers among the three co-ordinate branches of the state government.

Therefore, we do not hesitate to say that the power to punish for contempt is inherent in the Supreme Court of Colorado; that so long as fundamental rights are not violated nor infringed, there are and can be no limitations upon the exercise of the power.

In *Ex parte Robinson*, 19 Wall., 510, Mr. Justice Field, speaking for this court, said:

> "The power to punish for contempts is inherent in all courts; its existence is es-

sential to the preservation of order in judicial proceedings and to the enforcement of judgments, orders and writs of the courts, and, consequently, to the due administration of justice.

"The moment the courts of the United States were called into existence and invested with jurisdiction over any subject they became possessed of this power.

"But the power has been limited and defined by the act of congress of March 2, 1831. The act in terms applies to all courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may, perhaps, be a matter of doubt."

In *Ex parte Terry*, 128 U. S., 289, the opinion of the court was written by Mr. Justice Harlan, who quotes from the opinion in *Ex parte Robinson* relative to the inherent power of courts to punish for contempt, and then continues:

"And such is the recognized doctrine in reference to the powers of the courts of the several states.

" 'The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice,' the Supreme Judicial Court of Massachusetts well said in Cartwright's case, 114 Mass., 230, 238, 'is inherent in courts of chancery and other superior courts, as essential to the execution of their powers and to the main-

tenance of their authority, and is part of the law of the land, within the meaning of Magna Charta and of the twelfth article of our declaration of rights.' The declaration of rights here referred to was that which formed part of the Constitution of Massachusetts, and contained the prohibition, inserted in most of the American Constitutions, against depriving any person of life, liberty or estate, except by the judgment of his peers, or the law of the land. So in Cooper's case, 32 Vermont, 253, 257: 'The power to punish for contempt is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity; implied, because it is necessary to the exercise of all other powers.'

"Without such power, it was observed in Easton vs. State, 39 Alabama, 551, the administration of the law would be in continual danger of being thwarted by the lawless.

"To the same effect are Watson vs. Williams, 36, Miss., 331, 344; Johnson vs. Commonwealth, 1 Bibb, 598; Commonwealth vs. Dandridge, 2 Va. Cases, 408; Ex parte Hamilton & Smith, 51 Alabama, 66, 68; Redman vs. State, 28 Indiana, 205, 212; People vs. Turner, 1 California, 152, 153; State vs. Morrill, 16 Arkansas, 384, 388, and numerous cases cited in note to Clark vs. People, *ubi supra*, in 12 Am. Dec., 178. See, also, Queen vs. Lefroy, L. R. 8, Q. B., 134."

> "It is true, as counsel suggests, that the power which the court has of instantly punishing, without further proof or examination, contempts committed in its presence, is one that may be abused, and may sometimes be exercised hastily or arbitrarily. But that is not an argument to disprove either its existence or the necessity of its being lodged in the courts. That power cannot be denied them without inviting or causing such obstruction to the orderly and impartial administration of justice as would endanger the rights and safety of the entire community. What was said in *Ex parte Kearney*, 7 Wheat., 38, 45, may be here repeated: 'Wherever power is lodged it may be abused. But this forms no solid objection against its exercise. Confidence must be reposed somewhere; and if there should be an abuse, it will be a public grievance, for which a remedy may be applied by the legislature, and is not to be devised by courts of justice.' "

Speaking of contempts committed in the presence of the court, the opinion says:

> "According to the unbroken chain of authorities reaching back to the earliest times, such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions."

The same thing is equally true of contempts not committed in the presence of the court.

In *In re Savin, Petitioner,* 131 U. S., 267, upon the question of the procedure adopted by the court below, this court, in its opinion says:

> "It (the court) in its discretion, could adopt such mode of determining the question as it deemed proper, provided due regard was had to the essential rules that obtain in the trial of matters of contempt."

To the same effect is *In re Cuddy, Petitioner,* 131 U. S., 280.

We refer, also, to the case of Eilenbecker vs. District Court of Plymouth County, 134 U. S., 31, and quote from the opinion, at page 38:

> "It will thus be seen that even in the act of congress intended to limit the power of the courts to punish for contempt of its authority by summary proceedings, there is expressly left the power to punish in this summary manner the disobedience of any party, to any lawful writ, process, order, rule, decree or command of said court. This statute was only designed for the government of the courts of the United States, and the opinions of this court in the cases we have already referred to show conclusively what was the nature and extent of the power inherent in the courts of the states by virtue of their organization, and that the punishments which they were authorized to inflict for the disobedience to their writs and orders were ample and summary, and did not

require the interposition of a jury to find the facts or assess the punishment. This, then, is due process of law in regard to contempts of courts; was due process of law at the time the fourteenth amendment of the federal Constitution was adopted; and nothing has ever changed it except such statutes as congress may have enacted for the courts of the United States, and as each state may have enacted for the government of its own courts."

* * * * * *

"So that the proceeding by which the fine and imprisonment imposed upon these parties for contempt in violating the injunction of the court, regularly issued in a suit to which they were parties, is due process of law, and always has been due process of law, and is the process or proceeding by which courts have from time immemorial enforced the execution of their orders and decrees, and can not be said to deprive the parties of their liberty or property without due process of law.

"The counsel for plaintiffs in error seek to evade the force of this reasoning by the proposition that the entire statute under which this injunction was issued is in the nature of a criminal proceeding, and that the contempt of court of which these parties have been found guilty is a crime for the punishment of which they have a right to trial by jury.

"We can not accede to this view of the subject. Whether an attachment for contempt of court, and the judgment of the court punishing the party for such contempt, is, in itself, essentially a criminal proceeding or not, we do not find it necessary to decide. We simply hold that, whatever its nature may be, it is an offense against the court and against the administration of justice, for which courts have always had the right to punish the party by summary proceeding and without trial by jury; and that in that sense it is due process of law within the meaning of the fourteenth amendment of the Constitution. We do not suppose that that provision of the Constitution was ever intended to interfere with or abolish the powers of the courts in proceedings for contempt, whether this contempt occurred in the course of a criminal proceeding or of a civil suit."

Interstate Commerce Commission vs. Brimson, 154 U. S., 447. The opinion of the court was delivered by Mr. Justice Harlan, in the course of which it is said:

"In matters of contempt a jury is not required by 'due process of law.'

"From the very nature of their institution, and that their lawful judgments may be respected and enforced, the courts of the United States possess the power to punish for contempt.

> "And this inherent power is recognized and enforced by a statute expressly authorizing such courts to punish contempts of their authority when manifested by disobedience of their lawful writs, process, orders, rules, decrees or commands.
>
> "Surely it can not be supposed that the question of contempt of authority of a court of the United States committed by a disobedience of its orders, is triable, of right, by a jury."

This language applies with equal force to the inherent power of the Supreme Court of a state.

In re Debs, 158 U. S., 564. Debs was a labor leader. At the suit of the United States, filed by authority of the attorney general, an injunction was granted, restraining the defendants from certain acts in obstruction of interstate commerce and interfering with the United States mails. For violation of this injunction Debs was adjudged guilty of contempt. He applied for a writ of habeas corpus. This was denied him, and in the opinion the court, among other things, says:

> "Nor is there in this any invasion of the constitutional right of trial by jury. We fully agree with counsel that 'it matters not what form the attempt to deny constitutional right may take. It is vain and ineffectual, and must be so declared by the courts;' and we reaffirm the declaration made for the court by Mr. Justice Bradley, in

Boyd vs. The United States, 116 U. S., 616, 635, that 'It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. The aim should be *obsta principis*.'

"But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been from time immemorial the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders, it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency.

"In the case of Yates, 4 Johns, 314, 369, Chancellor Kent, then Chief Justice of the Supreme Court of the State of New York, said: 'In the case of the Earl of Shaftesbury, 2 St. Trials, 615; s. c., 1 Mod., 144, who was imprisoned by the House of Lords for "high contempts committed against it" and brought into the King's Bench, the court held that they had no authority to judge of the contempt and remanded the prisoner. The court, in that case, seem to have laid down a principle from which they never have departed, and which is essential to the due administration of justice. This principle,

that every court, at least of the superior kind, in which great confidence is placed, must be *the sole judge*, in the last resort, of contempts arising therein, is more explicitly defined and more emphatically enforced in the two subsequent cases of the Queen vs. Paty and others, and of the King vs. Crosby.' And again, on page 371, 'Mr. Justice Blackstone pursued the same train of observation, and declared that all courts, by which he meant to include the two houses of Parliament, and the courts of Westminster Hall, could have no control in matters of contempt. That the sole adjudication of contempts, and the punishments thereof, belonged exclusively and without interfering to each respective court.'

"In Watson vs. Williams, 36 Mississippi, 331, 341, it was said: 'The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and co-existing with them by the wise provisions of the common law. A court without the power to effectually protect itself against the assaults of the lawless, or to enforce its orders, judgments or decrees against the recusant parties before it, would be a disgrace to the legislation, and a stigma upon the age which invented it.'

"In Cartwright's case, 114 Mass., 230, 238, we find this language: 'The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in courts of chancery and other superior courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land, within the meaning of Magna Charta and of the twelfth article of our declaration of rights.'

"See also United States vs. Hudson, 7 Cranch, 32; Anderson vs. Dunn, 6 Wheat., 204; Ex parte Robinson, 19 Wall., 505; Mugler vs. Kansas, 123 U. S., 623, 672; Ex parte Terry, 128 U. S., 689; Eilenbecker vs. Plymouth County, 134 U. S., 31, 36, in which Mr. Justice Miller observed: 'If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it;" Interstate Commerce Commission vs. Brimson, 154 U. S., 447, 488. In this last case it was said: 'Surely it cannot be supposed that the question of contempt of the authority of a court of the United States, committed by a disobedience of its orders, is triable, of right, by a jury.' "

In the exercise of the inherent power of the Supreme Court of Colorado the plaintiff in error was adjudged guilty of contempt. If, in the proceeding had, no fundamental right of plaintiff in error, no

right guaranteed or protected by the Constitution of the United States was violated, then there is nothing of which he can complain, and nothing which can invoke the jurisdiction of this court. By his motion to quash the information filed in the Supreme Court of Colorado, and by his answer made in response to the rule to show cause, the plaintiff in error made the claim that the proceedings against him were in violation of and contrary to the fourteenth amendment to the Constitution of the United States, and particularly that part of said amendment which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or property without due process of law, nor deny to any person the equal protection of the law. Upon this claim alone is the jurisdiction of this court invoked.

To determine whether plaintiff in error has been denied due process of law, and whether this court has jurisdiction of this proceeding, it becomes pertinent to inquire in what respect plaintiff in error was deprived of due process of law in the proceedings had against him. In other words, to inquire what essential element of "due process" was wanting in those proceedings.

Plaintiff in error surely had notice of the proceedings in the Supreme Court of Colorado. Upon the filing of the information, citation issued requiring him to show cause why he should not be punished as for contempt. Service of this citation was had. Plaintiff in error appeared. His first appearance was in form, special. He moved to quash the information

and dismiss the proceedings. This motion was denied. Thereupon, he filed answer seeking to justify the publication of the articles and cartoon set forth in the information. By this answer, the charges of corruption, of corrupt motive, and of corrupt decision which had been made against the court by the newspaper articles in question, were re-affirmed and reiterated and the truth of these charges asserted as a justification and as a defense to the proceedings for contempt.

In Papke vs. Papke, 30 Minn., 260, the court held that where defendant was brought before the court on a warrant of contempt, who, while obpecting to the jurisdiction of the court to try him for the contempt, at the same time presents objections that do not go to the jurisdiction, but to the merits of the charge, waives his objection to the jurisdiction.

If any doubt had previously existed as to the court's jurisdiction over the person of the defendant, the full appearance made by this answer was a complete submission of the person of plaintiff in error to the jurisdiction of the court. He appeared in person and by counsel, and his submission to the jurisdiction of the court was complete. Jurisdiction of the subject-matter, the court undoubtedly had.

Upon the filing of the answer, the attorney general moved for judgment upon the pleadings. This motion was sustained. This involved the holding that the truth or falsity of the matters set forth in the answer was not material; that the answer as a defense was insufficient in point of law; that the proceeding was not a prosecution for libel in any sense, and was not, and could not be, governed by the law of Colorado relating to prosecutions for libel.

Upon the granting of the motion for judgment upon the pleadings, upon hearing of which plaintiff in error had his day in court, he was adjudged guilty of contempt as charged in the information, was fined in the sum of one thousand dollars and adjudged to be committed until payment of the fine should be made.

We submit with the utmost confidence that every essential element required by the law of the land—everything involved in the phrase "due process of law"—was present in the proceedings had. There was notice, there was hearing, there was judgment only after hearing; the court had jurisdiction both of the subject-matter and of the person of plaintiff in error, and, after hearing, pronounced only such judgment as under the law it had power to pronounce.

Summary proceeding in contempt matters is due process of law, has always been due process of law; and punishment for contempt after notice, after hearing and within the proper powers of the court, invades no right of a citizen.

In *Ex parte Wall*, 107 U. S., 265, *it was held by the court, speaking through Mr. Justice Bradley, that want of an affidavit making charges against an attorney to show cause why he should not be disbarred, was not jurisdictional and did not render the proceeding void.* It was further held that the proceeding did not violate the constitutional provision which requires indictment and trial by jury in criminal cases, and that it was not an invasion of the constitutional provision that no person shall be deprived of life, liberty or property without due process of law; it was held that the proceeding was due process of law. We quote from the opinion as follows:

"In Ex Parte Steimen & Hensel, 95 Pa. St., 220, where the County Court, on its own motion, had cited the parties before it for publishing a gross libel upon the court, and had struck their names from the roll, though on appeal the order was reversed on other grounds, as to the mode of initiating the proceedings, Chief Justice Sharswood, delivering the opinion of the court, said: 'We entertain no doubt that a court has jurisdiction without any formal complaint or petition, upon its own motion, to strike the name of an attorney from the roll in a proper case, provided he has had reasonable notice, and been afforded an opportunity to be heard in his defense.'

"In the case of Randall vs. Brigham, 7 Wall., 523, 539, which was an action for damages brought by an attorney against a judge for striking his name from the roll unjustly and without authority, not having before him, in making the order to show cause, any charge of misconduct, except only a letter of a third person addressed to the grand jury, this court, speaking by Mr. Justice Field, said: 'But the claim of the plaintiff is not correct. The information imparted by the letter was sufficient to put in motion the authority of the court, and the notice to the plaintiff was sufficient to bring him before it to explain the transaction to which the letter referred. The informality of the notice or of the complaint by letter, *did not touch the question of jurisdiction.* The

plaintiff understood from them the nature of the charge against him, and it is not pretended that the investigation which followed was not conducted in fairness. He was afforded ample opportunity to explain the transaction and vindicate his conduct.'

"The constitutional privilege of trial by jury does not apply to prevent courts from punishing their officers for contempt, or from removing them in proper cases.

* * * * * *

"The power to do this is a rightful one, and when exercised in proper cases, is no violation of any constitutional provision.

"It is contended, indeed, that a summary proceeding against an attorney to exclude him from the practice of his profession on account of acts for which he may be indicted and tried by a jury is in violation of the fifth amendment of the Constitution, which forbids the depriving of any person of life, liberty or property without due process of law; but the action of the court, in cases within its jurisdiction, is due process of law. It is a regular and lawful method of proceeding, practiced from time immemorial.

* * * * * *

"It is a mistaken idea that due process of law requires a plenary suit and a trial by jury, in all cases where property or personal rights are involved."

* * * * * *

"In all cases, *that kind of procedure is due process of law, which is suitable and*

proper to the nature of the case, and sanctioned by the customs and *usages of the courts.* 'Perhaps no definition,' says Judge Cooley, 'is more often quoted than that given by Mr. Webster, in the Dartmouth College case: "By the law of the land, is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."' (Cooley's Const. Lim., 353.)

"The question, what constitutes due process of law within the meaning of the Constitution, was much considered by this court in Davidson vs. New Orleans, 96 U. S., 97, and Mr. Justice Miller, speaking for the court, said: 'It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding *applicable to such a case.*'"

In Hurtodo vs. California, 110 U. S., 516, it is said that the fourteenth amendment

"must be held to guarantee, *not particular forms of procedure,* but the very substance of individual rights of life, liberty and property."

Again we ask, in what respect has "due process" been denied? If the case made by plaintiff in error furnishes any answer to this question, it is this: That the Supreme Court of Colorado has in this case departed from its former decisions in similar cases. That the former decisions of that court were to the effect that proceedings to punish for contempt, not committed in the presence of the court, must be initiated by affidavit; that the affidavit was held to be jurisdictional; that in the case at bar the Colorado court did not follow its former decisions, but permitted this proceeding to be initiated and concluded upon an unsworn information filed by the attorney general.

The logic of this contention is that if a state court departs from its former rulings and adopts or upholds a new rule of procedure, it has denied due process of law in the case in which such departure is made. Upon this theory no court of last resort in any state could ever change its ruling upon a given point without violation of the provisions of the fourteenth amendment.

We, of course, deny, most emphatically, that the decision of the Supreme Court of Colorado in this case departed in any degree from the earlier rulings and decisions of that court.

As respects the matter of the verification or want of verification of an information filed by the attorney general, the question had never been before the Supreme Court of Colorado in any form. Every other essential matter determined in this case had been the subject of previous ruling by the Supreme Court of Colorado, and in the decision in this case, the earlier rulings were followed.

Hughes vs. People, 5 Colo., 436.

Cooper et al. vs. People, 13 Colo., 337.
Wyatt vs. People, 17 Colo., 260.
People vs. Stapleton, 18 Colo., 568.
Bloom vs. People, 23 Colo., 424.

But the real contention of plaintiff in error is not that he was denied due process of law. Looking into the record, going behind the form and reaching the substance of the contention of plaintiff in error, it will be found that the right or privilege which plaintiff in error really claims to have been deprived of, was and is the right of free speech,—the so-called "freedom of the press."

The right of free speech is not guaranteed by the federal Constitution, except from interference by congress. To the state has been left the matter of guaranteeing and protecting freedom of speech. The Constitution of the State of Colorado provides by section 10 of article 2, that:

> "No law shall be passed impairing freedom of speech, and that every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty, and that in all suits and prosecutions for libel, the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the facts."

The judgment of the Supreme Court of Colorado denying plaintiff in error the privilege or immunity claimed under the Constitution of Colorado, is binding upon this court, raises no federal question and does not entitle plaintiff in error to a review here.

In *Spies vs. Illinois*, 123 U. S. 131, it is held that it is well settled that the first ten articles of the Amendments to the Constitution of the Unied States were no intended to limit the powers of the states in respect to their own people, but to operate on the national government only. And in the same case it is held that the United States Revised Statutes, section 709, gives the United States Supreme Court jurisdiction because of denial by state court of any title, right, privilege or immunity claimed under the constitution or any treaty or statute of the United States, and that it must appear that such right, privilege or immunity was duly set up.

In re Kemmler, 136 U. S. 436: The opinion was delivered by Mr. Chief Justice Fuller, and it is there said:

> "The decision of the state courts, sustaining the validity of the act under the state Constitution, is not re-examinable here; nor was that decision against any title, right, privilege or immunity specially set up or claimed by the petitioner under the Constitution of the United States. * * *
>
> "The Fourteenth Amendment did not radically change the whole theory of the relation of the state and federal governments to each other, and of both governments to the people. The same person may be, at the same time, a citizen of the United States and a citizen of the state. Protection to life, liberty and property rests primarily with the states,

and the amendment furnishes an additional guarantee against any encroachment by the states upon those fundamental rights which belong to citizenship, and which the state governments are created to secure. The privileges and immunities of citizens of the United States as distinguished from the privileges and immunities of citizens of the states are indeed, protected by it; but those are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States. Citing United States vs. Cruikshank, 92 U. S. 542; and the Slaughterhouse Cases, 16 Wall, 36."

"As due process of law in the Fifth Amendment referred to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law, so, in the Fourteenth Amendment, the same words refer to that law of the land in each state, which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in

> the enjoyment of their rights; and, in the administration of criminal justice, requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offenses. But it was not designed to interfere with the power of the state to protect the lives, liberty and property of its citizens, and to promote their health, peace, morals, education and good order. Barbier vs. Connolly, 113 U. S. 27, 31."

Plaintiff in error himself made plain the real nature of the controversy—the real privilege or immunity claimed—when he said:

> "I consider the proceedings against me as a direct assault upon the freedom of the press, and I shall defend that ancient and important prerogative of a free people with all my power."

The real issue, therefore, is not whether plaintiff in error has been deprived, or will be deprived, of property without due process of law; but is merely whether he has been deprived of his right of free speech.

The right of free speech is a valued and important right. It is proper that it should be safeguarded, guaranteed and protected by the fundamental law. It is deservedly considered one of our greatest birthrights. But liberty of speech may be abused. For abuse thereof every citizen of Colorado is, by the Constitution of that State, made responsible. He may be liable criminally; he may be liable in civil action

for damages; he may be liable to punishment for contempt. It is the use, not the abuse of the right, that is protected. And when the distinguished plaintiff in error boldly and knowingly abused that privilege, whether from personal or political motives, or whether without motive, he rendered himself liable to such consequences as might follow under the law of the sovereign State of Colorado. Those consequences he cannot evade nor avoid. It is vain and useless for him to urge that any right, privilege or immunity guaranteed him by the federal Constitution has been denied him. The whole record is against it. The whole record speaks the fact that the real controversy here—the controversy in the court below, and the only controversy—is and was, whether plaintiff in error has been deprived of the right or privilege which he asserts to speak and write what he pleases, when he pleases and of whom he sees fit.

This is the right which he specially set up and relied upon in the Colorado court. This is the principle for which he is and has been contending. This is the true subject matter of this case. This is the question which was determined by the Supreme Court of Colorado. And that it raises no federal question is not a matter which admits of argument.

But, however important the right of free speech, let those who contend for unlimited license to publish at will and without restraint be reminded that in the last analysis the safety, the efficiency and the value of our institutions rest with the judiciary. The powers and the standing of the courts must be preserved. To strip the courts of inherent and essential powers; to lay them open to and defenseless against

the attacks of those who, for any reason, may desire by improper means to influence the course of the administration of justice, is the surest way to break down the greatest safeguard of true liberty, destroy our theory of government and open the way to the exercise of unwarranted and arbitrary power.

There is no serious contention by plaintiff in error that he has been denied the equal protection of the law; no claim that the procedure, the ruling or the judgment of the court below would have been different in the case of any other person under similar conditions and like circumstances. If such contention were made, it would find its answer in the prior cases of contempt reported in the Colorado reports. From these it will appear that plaintiff in error was in no way singled out as a shining mark; that he was not made an especial object of the court's attention; that he simply brought upon himself the same consequences, the same proceeding and the same judgment that would have been the lot of any other citizen of Colorado who might, in the same way, and by the same means, have made an attack upon the administration of justice in a manner calculated to embarrass the court in the consideration of pending cases.

In *Tinsley vs. Anderson,* 171 U. S. 101, the opinion of the court was delivered by Mr. Justice Fuller. In this case it is held that the appellate jurisdiction of the Supreme Court from a state court extends to a final judgment or decree in any suit, civil or criminal, in the highest court of a state where a decision in the suit could be had, against a title, right, privilege or immunity, specially set up and claimed under

the Constitution, or a treaty or statute of the United States; and *that the right to the equal protection of the laws is not denied by a state court when it is apparent that the same law or course of procedure would be applied to any other person in the state under similar circumstances and conditions.* And, further, that when the committing court has jurisdiction of the subject matter and of the person, and power to make the order for disobedience to which a judgment in contempt is rendered and to render that judgment, then the appellate court cannot do otherwise than discharge a writ of habeas corpus brought to review that judgment, and secure the prisoner's discharge, as that writ cannot be availed of as a writ of error or appeal.

Plaintiff in error attempts to make it appear that he was cited to show cause why he should not be punished for contempt; that when he filed an answer attempting to justify the publication of the articles in question, his answer was ignored and he was deprived of a hearing.

This is not the record. The record is that the sufficiency of the answer was put to the test by motion for judgment upon the pleadings. This motion was heard fully. Plaintiff in error sought by all the means in his power and all the power at his command, to establish at the hearing the sufficiency of his answer. The court held against him and gave judgment upon the pleadings. The sufficiency of that answer is a matter upon which the decision of the Colorado court is final and conclusive. And out of the ruling there arises no federal question.

See the case of *Iowa Central Ry. Co. vs. Iowa*, 160 U. S. 389, where it is held that the Fourteenth

Amendment of the federal Constitution *in no way controls the power of the state over procedure, if the procedure adopted gives reasonable notice and fair opportunity to be heard, it will not be held obnoxious to the provision respecting due process of law.* Whether the state court has properly construed its own laws and Constitution in summary proceedings is purely a question of state law and binding in courts of the United States. The Supreme Court of the United States has no power to review a decision of the state court that an answer in a summary proceeding sets forth no defense.

In *Mitchell vs. Clark,* 110 U. S. 638, it is held that where a defendant pleads the state Constitution as a defense, a judgment in the state court overruling such defense raises no federal question.

The question of the court's jurisdiction and the merits of the case are so closely interwoven that it has not seemed possible to separate them in argument. A thorough understanding of the record makes plain the want of jurisdiction in this court to review the case. The question of jurisdiction is the first matter for consideration.

Giles vs. Teasley, 193 U. S. 146, 160.

It has been raised by motion. It is now urged. We submit with confidence that it is decisive of the case and that the writ of error should be dismissed.

The grounds upon which the court below based its decision against plaintiff in error were independent of and did not involve a federal question. Even the vigorous dissenting opinion in the case was not based upon consideration of a federal question.

In this state of the record, we submit that under the repeated decisions of this court, the motion of defendant in error to dismiss or affirm should be granted.

Eustes vs. Bolles, 150 U. S., 361.

Cornell vs. Green, 163 U. S., 75.

Fowler vs. Lampson, 164 U. S., 252.

N. Y. Life Ins. Co. vs. Hendren, 92 U. S., 286.

Giles vs. Teasley, 193 U. S., 146.

Chapin vs. Fye, 179 U. S., 127.

Wabash Railroad Co. vs. Flannigan, 192 U. S., 29.

In conclusion, we assert that plaintiff in error, by his own deliberate act, invited the judgment of the court below; that he well knew the probable and lawful consequences; that he was denied no fundamental right under any law; that the proceedings against him were in all respects in accordance with the law of the land; that he was deprived neither of due process of law nor of the equal protection of the law; that he presents nothing which entitles him to invoke the jurisdiction of this court; that he must accept and abide by the result which was proper, logical and in all respects in accordance with law.

Respectfully submitted,

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